IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE SCHWARZ, deceased, by and through her Personal Representative, RICHARD SCHWARZ,	)	
Plaintiff,	)	Circuit Court
	)	Case No. 0002-01376
vs.	)	
PHILIP MORRIS INCORPORATED, a foreign corporation, and ROTHS I.G.A. FOODLINER, INCORPORATED, an Oregon corporation,	)	Appellate Case No. A118589
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

Volume 41-B

11:25 a.m. - 12:45 p.m.

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Roosevelt Robinson, Judge of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 11:25 a.m., Friday, March 8, 2002.

* * *

Katie Bradford, CSR 90-0148
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APPEARANCES:

Mr. D. Lawrence Wobbrock, Attorney at Law,
Mr. Charles S. Tauman, Attorney at Law,
Mr. Richard A. Lane, Attorney at Law,
Appearing on behalf of the Plaintiff;

Mr. James L. Dumas, Attorney at Law,
Mr. John W. Phillips, Attorney at Law,
Appearing on behalf of Defendant
Philip Morris, Incorporated and Defendant
Roths I.G.A. Foodliner, Incorporated.

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Richard Carchman

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(Friday, March 8, 2002, 11:25 a.m.)

P R O C E E D I N G S

(Whereupon, the following proceedings were held in open court:)

(Court Reporter Estelle Keating reported Volume 25-A.)

THE COURT: All right. Thank you. We are ready to proceed again.

Counsel, please proceed.

MR. WOBBROCK: Thank you, Your Honor.

RICHARD CARCHMAN

Was thereupon recalled as a witness on behalf of the Defendant, and, having been previously duly sworn, was examined and testified as follows:

FURTHER CROSS-EXAMINATION

BY MR. WOBBROCK:

Q These efforts that we were talking about to let consumers -- to finally let consumers know that the FTC machine smoking has little to do with how they smoked, those wouldn't have helped Michelle Schwarz, would they?

A I don't know.

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Q Well, do you know when she died, sir?
A Recently, in the last --
Q I am not expecting you to know. Let me just tell you: August 13th of 1999.
A I believe I knew it was 1999. I didn't know the date.
Q And these efforts that the company has -- you've indicated you weren't sure were feasible before are more recent than that, are they not, sir?
A I am not sure I understand your question. What's more feasible?
Q Well, these efforts that you're talking about. Let me make sure we're talking about the same thing. What are you talking about, about Philip Morris' efforts to let people know that the FTC machine smoking isn't the same as they smoke? What are you talking about?
A There is -- I've seen an advertisement as part of -- as part of an advertisement, I've seen a statement that tells the consumer that these FTC numbers, and I'm paraphrasing, may not represent what the consumer takes, something like that. It depends on how you smoke the cigarette.
Q Is that a magazine advertisement?
A Could be.

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Q Have you seen anything connected with a point of purchase receipt?
A I think that's what I saw.
Q Okay. And that is, would you agree, is much more recent than August of '99?
A I just saw it.
Q You just saw it?
A Yes.
Q You just became aware of it yesterday?
A I think that's correct.
Q Did the lawyers in this case give it to you?
A I think they showed it to me.
MR. WOBBROCK: Your Honor, I have a matter for the Court, but I'll leave it for a few minutes.
THE COURT: All right. Very well, counsel.
MR. WOBBROCK: If I am communicating with the Court -- well, I'll just leave that matter if we can reserve it until later.
THE COURT: That's fine, counsel.

BY MR. WOBBROCK:

Q What has been marked and the jury has seen, and I'll put the sticker on the back, is 2035. Is this the thing that the lawyers recently showed

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you?
A It looks like it, yes.
Q And for the record, 2035 says, "15-milligram tar, 1.1-milligram nicotine average per cigarette by FTC method. The amount of, quote, 'tar' unquote, and nicotine you inhale will vary depending upon how you smoke the cigarette. For more information about PM USA and its products, visit," and then it gives their Web site.
And you became aware of this for the first time within the last, what, 24 hours?
A Yesterday.
Q And it was your testimony -- well, let's go back to something else.
When we talk about things like EPA ratings, let's see if we can also talk about what people look at in the way of numbers when they are eating mayonnaise, for example. Would you agree, sir, when people look at labels they sometimes are very concerned with, say, the amount of sugar, the amount of fat or the amount of cholesterol or whatever might be in a product?
A And some people aren't concerned at all.
Q Some people aren't concerned at all?
A Yes.

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Q But the people that are concerned look at numbers as those numbers have a particular significance to them, don't they?
A They should, yes.
Q So if the number is, this is half as much cholesterol as this product, people tend to draw conclusions from that, correct?
A They make inferences, and those things are usually standardized to a unit serving.
Q All right. And as you previously testified to regarding the '81 Surgeon General's report that we talked about earlier --
A Yes.
Q You are familiar with that. This FTC rating of tar and nicotine yield measures an implied risk to the smoker. That's the kind of conclusions, the implied conclusions, people can make, correct?
A That's the conclusion the Surgeon General made. This gets to your point about the government knew it, the Surgeon General knew it, the FTC knew it, Philip Morris knew it.
Q And now we see for the first -- in that little slip, for the first time, at least as you're aware of in the last 24 hours, that Philip Morris is making an effort to let people know it?

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A Yes, sir.
Q But the difference between the EPA rating, for example, analogy, and this FTC testing, would you agree, sir, that people generally know on the FTC -- excuse me, on the EPA rating of their automobile, they're not going to get what's on the windshield sticker. If it says 30 miles per hour [sic], they are probably not going to get that?
A I don't know. I know that I personally never got that number. Whether anybody else believes that or knows that, I don't know.
Q And would you agree, sir, that people know for sure they're not going to get that if they're jamming on the accelerator, and going real fast and driving 80 miles an hour, they are probably not going to get that kind of mileage?
A I know I wouldn't.
Q Right. And it says, I think, on the sticker, does it not, when driven at highway miles and then town miles?
A Highway and city.
Q Something like that. No one is implying that if you drive 80 miles an hour, you are going to get 30 miles a gallon?
A Actually, those numbers never captured

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that. The inference is highway is different than city, at least in terms of stop and go traffic and that somehow impacts the MPG.

Q You would agree, sir, though, that most people understand that they have control over what kind of mileage they are going to get by how hard they drive the car?

A And where they drive the car.

Q I think we're up to point eight on agreement?

A At least in driving.

Q On driving, right.

A Yeah.

Q But with this FTC rating, it differs from the EPA analogy in those two important respects: People don't know that they're getting more than is listed on that label and they don't know that they have control maybe over how much they get. Those are two very important differences, and that's exactly the reason that your company has all of a sudden decided to tell them?

A I don't -- I don't think I agree with you, and I'm sorry if this breaks the chain of our agreements. It goes back to both our knowledge and the government's knowledge about the purpose of the

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FTC test.

If you are now asking the test to represent something it was never intended to do nor capable of doing, then the issue is -- is one that can't be resolved by putting a number in advertising. I think what the company is doing now is addressing an issue that has evolved. The purpose of this test has changed in people's minds. The purpose has changed.

Given that change, and the fact that this test can never -- was never intended nor can it ever measure what a person is taking in, the company has taken this step. Whether the FTC will continue to allow this or not, I don't know. For me, this potentially could undermine the government's intent for this -- these numbers in this particular test.

I don't mean to pretend to be a lawyer, but as I sit here today, I can see somebody else with a different interest than yours saying, "You are undermining the government's intent." And so then I can find myself in another courtroom with a different kind of jury answering a number of questions saying, "Why are you undermining the government's intent?"

And I would raise my hands and look for some divine guidance and say, "We're trying to do the best we can in a difficult situation."

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Q The fact is, sir, you have known for years, you have known since 1961, your company, or 1971, through studies and internal documents that people don't get from the FTC machine the same amount -- people don't get the same amount when they smoke as the FTC machine does. And if they smoke a low-tar cigarette, they often compensate up. You've known that, haven't you, sir?

A Yes, and so has the Federal Trade Commission and other public health people, including the Surgeon General.

Q But you did not ever take the opportunity to publish in 448 newspapers around the country something like this: Exhibit 2035. That you did with The Frank Statement, or in any way other way until within, to your knowledge, the last 24 hours you attempted to communicate this issue to people?

A And I think that The Frank Statement is separate and distinct in my mind from this advertisement. This advertisement, I think, is a double-edged sword. On the one hand, we're attempting to communicate to the consumer something the public health people have said people are not understanding these numbers.

They don't read, as you pointed out -- did

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the late Ms. Schwarz read this press release? I don't know, so Philip Morris is now attempting to do that. I would not be surprised, though I have no first-hand knowledge, that the FTC could very well get upset with this advertisement as undermining the intent of what the law required us to do and why.

And I think somebody is just going to have to wait and see whether this stands up, whether it gets knocked down or not. I think this is the right kind of approach to take, and we'll see what government has to say about it.

Q When your company saw a three-point drop in the stock market in 1954, it became so alarmed, it hired the Hill & Knowlton public relations firm that worked for it for the next 40 years. It set up the Tobacco Industry Research Committee. It then changed its name to the Center for Tobacco Research and to Tobacco Institute.

It did all these things and for 40 years publicized its own interest because of a three-point drop in the stock market, and put these kinds of statements in 441 newspapers around the country, and something as important as full compensation, where somebody smokes a cigarette and they think they are getting half of what they thought they got from the

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previous cigarette, your company does not make the simple effort to put before the American people this kind of statement; isn't that true, sir?

A I have absolutely no idea what you're talking about, about stock drops in 1954 of Philip Morris. This Frank Statement, Philip Morris is one of the signatories. My recollection, I am neither a lawyer nor a financial stock market expert, is Philip Morris was the teeniest of the tiniest of these companies. And what the stock price was in 1954 of Philip Morris stock, I have not one single clue.

Q Let's talk about the effects of compensation, and we'll put that aside.

You indicated which counsel asked you if Michelle Schwarz was observed as inhaling deeper, puffing longer, maybe more frequently as her husband has testified, if she compensated, you said the best way to do an evaluation of that would be a bioassay?

A Biomarker, yes.

Q Biomarker. And that would be cotinine, for example?

A Actually, I don't think cotinine is the best way, but it is gives you a reasonable approximation.

Q Carbon monoxide?

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A Not as good as cotinine.
Q Cotinine being the metabolite of nicotine, correct?
A No.
Q No?
A No. It is a metabolite of nicotine.
Q It's hard to see how we have disagreement there, but if you think we do, we won't count that as number eight -- nine.
A I trust your arithmetic. My only point is when you asked me about cotinine being the best, and I said, "It's okay." And cotinine being the metabolite, there are at least six or seven -- my point is the following, though. Cotinine only represents ten to at best 30 percent of the nicotine that you measure. And there is tremendous variability between people and within a person in the course of a day.
That's why I say it's okay. It's better than carbon monoxide, because the only place you're going to find nicotine is in tobacco. You are going to find carbon monoxide naturally in the body and just walking around breathing air, so maybe we agree.
Q Right. I am going to use a term now that we talked about earlier in this case, and in any other case it would sound very out of place. But I am sure

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you're familiar with it because this is your business.
You'd agree that cotinine is better than cigarette-butt analysis?
A In the current state of science, I would say generally speaking, but you have to tell me what question is -- you're asking for me to tell you whether one thing is better than another?
Q If you are trying to determine, for example, how much nicotine and tar someone has ingested over a period of time, cotinine analysis from their blood, take their blood and analyze it, is a more reliable, more exact method than analyzing cigarette butts?
A In today's knowledge of science, that would be a way I would prefer going, though I would not -- I would also take the butts and also measure the nicotine, and also do what Dr. Kozlowski does and actually look at the pattern on the butt for nicotine. I wouldn't throw any information away at this point.
Q If Dr. Benowitz were to have testified before this jury that butt analysis, cigarette-butt analysis, is a cruder way of measuring nicotine and tar ingestion than cotinine levels, would you agree?
A I would -- I would agree and add something additional. Cotinine is actually -- is closer to what

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you're taking in. What you're measuring in the butt is in the butt, and not in the person.

Q Right. And you're trying to then extrapolate --

A Absolutely.

Q -- what's remaining in the butt to what the person took in. That's the whole point of that.

A So we're on No. 10.

Q That's the whole point of that, though?

A Absolutely.

Q So when we look at this study that the company's lawyer wanted you to talk about, this Ryan study, Exhibit 915, we see here -- I don't know if we need to go through it word-for-word. You are familiar with this. You testified about it yesterday.

A This 1976 study?

Q Ryan study.

A Yes.

Q 1976, Exhibit 915. This is -- there are no cotinine levels measured here, are there?

A No, sir.

Q Although it finds more ingestion of tar and nicotine out of one of three studies, it does that through measures other than blood plasma bioassays?

A In its time, it was state of the art. It

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is nothing that you would do alone in 2002.
Q It uses butt analysis, does it not?
A Yes, that's what I mean. In its day, it was an appropriate measure.
Q And when it also checks to see if there is compensation, a measure of compensation is the number of cigarettes?
A Yes, sir.
Q Okay.
A And that's still a valid -- a valid measure, if done appropriately.
Q Right. But if someone is compensating, again, the concept is if they're drawing harder, holding it longer, smoking more frequently, puffing more frequently, we call that -- I think it has been called internal compensation within the cigarette, correct?
A It can be, yes.
Q Right. And someone could achieve the same amount of tar and nicotine on the full-flavored Benson & Hedges by doing those things, by drawing harder, holding the smoke longer, puffing more frequently, with that internal compensation method and not show any increase in the number of cigarettes that they're smoking, but actually get the same amount of

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tar and nicotine?
A Sure. This was the table akin to the table that was put up yesterday with the left side, the increased CPD, and then a list of nine things on the right side. There are many ways to get there, yes.
Q And I --
A You're talking about one kind of way.
Q And I'm just going to make a note here so I don't get lost, but I think that is number eleven that we agree on, maybe twelve.
A It depends on how you're sitting. It looks like an equal sign.
Q An equal sign. So we'll put an arrow like that.
A If that helps you. It doesn't help me.
Q Now, although you're critical, sir, of the Barbaro Goodman study --
A Critical only in a scientific sense. I am not saying there is anything wrong with a study like that at the time. Only critical in the sense, as any reasonable scientist would be, in making sure you look at the data. That's all.
Q Right. Well, we'll go back to Barbaro Goodman in just a minute.

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One of the significant differences in the Barbaro Goodman study as opposed to this one is that this study, as we see here, for some reason when it was done at an earlier time was sent to lawyers offices. That's kind of unusual for a scientific study, isn't it?

A In my experience, it is; but we have done studies, I've seen studies done for lawyers that had to do with regulatory, scientific studies that have to do with regulating information that was going to be submitted. Whether this applies here or not, I don't have a clue.

Q Well, assuming this, sir, if back in those days a way of keeping these documents from lawyers like me would be to send it to a law firm so then Philip Morris could say, "This is a privileged communication between a client and a lawyer. Wobbrock, you don't get it." That would be accomplished by this mechanism, wouldn't it?

A I don't know. If you say it could, I have no reason to doubt what you're saying, but I don't know.

Q Well, have you read this document closely, sir?

A I read the document. Did I pay any

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attention to the Covington piece? Actually, I didn't. I focused on the data. Maybe I should look at these studies now with a different eye.

Q And the document talks about not only sending just the study, but with all the records and the data were sent to the law firm. That was back before the Master Settlement Agreement had even been contemplated by anybody, correct, sir, 1968?

A By 30 years.

Q And the Master Settlement Agreement has required that all of the documents that were produced in litigation be made available, correct, sir?

A Yes.

Q And, in fact, this document was at one point contemplated to be used in a courtroom to defend your corporation, wasn't it?

A You have to -- you're not giving me enough information to know.

Q Is there information in this document that reveals that, sir?

A If there is, I didn't pay attention to it.

Q Let's look at it. This is my circling.

"Incidentally, there are several minor typographical errors in this report, which would make it criticizable in a courtroom or in a journal."

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Did you note that?

A This is not an article in a format that is applicable to any journal I'm aware of. As it relates to any courtroom, I am the wrong -- I have no idea how well lawyers and judges spell.

Q You and your wife, who is a lawyer, don't talk about those things too much?

A Actually, I'd like to get home and find out.

Q I hope to facilitate that real quickly.

Now, back to Barbro Goodman. Dr. Benowitz, I want you to assume, testified that five positive findings in this study is a very -- and I know you teach biostatistics. When you have five positive findings, that's an important finding, correct, sir?

A Actually, one finding. It reminds me of a story of a fellow driving down the road and a cow flies over his car. It may not be statistically significant, but you sure do notice the cow flying over. So you don't need five. You can just see one, and it doesn't even have to be statistically significant. So give me a number and say five important findings, there's no context there for me to say whether I agree or disagree. I don't even

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understand the question.
Q I miscommunicated, that's why, and I'm sorry.
A Okay.
Q There were five positive correlations in the study. At least that's what Dr. Benowitz in his reading interpreted, and he said, "Five positive correlations is an important finding." Would you agree with that?
A Again, I wouldn't necessarily agree or disagree. If I had 30 observations and five came out to be statistically significant, I can show you that those five came out to be statistically significant at the .05 level simply by chance. That's a well known statistical phenomenon. What is it, statistics, damn statistics and damn, damn statistics. I don't mean to use a bad word, but just to say there are five important things, again without a complete context is not informative.
Q Well, we see here that there were a total of nine smokers participating in the study?
A Just nine smokers, yes.
Q But five positive correlations of complete compensation, Dr. Benowitz said, was significant.
A Five out of an n of nine, and Dr. Benowitz

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said that was significant? I see. I find that hard to believe that that was precisely the question he was asked.

Q In any event, sir, this study was never repeated, was it?

A Ah, actually, the right way for me -- how reproducible was this study? And, in fact, I believe there were three Barbaro Goodman studies. This one, one that showed no compensation, and one that they couldn't determine what it was they found. In fact that lead to a summary conclusion by another scientist within Philip Morris, too, I think the head of R & D, saying, "You asked me about compensation" --

Q You are starting to quote hearsay again, aren't you, sir?

A I think I am, but actually I asked --

MR. WOBBROCK: I object you, Your Honor.

THE COURT: We'll stop right there, Doctor.

Move to your next question, counsel.

BY MR. WOBBROCK:

Q In fact, this study that Barbaro Goodman did, at least according, I want you to assume, by the testimony of Jerry Whidby, and you know who he is?

A Oh, yes.

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Q Dr. Whidby?
A Yes.
Q He said that a study like this was never repeated. Would you disagree with that?
A I am testifying here today that there are at least three studies that I've seen with Barbaro Goodman's name on it. Whether Dr. Whidby has seen them or not, I don't know. I have never spoken to Dr. Whidby about any trial testimony or any documents used in trial.
Q I am just asking if you agree with him when he said this study -- a study like this was never repeated with a smoke simulator?
A I don't agree.
Q And the other Goodman study was not a smoke simulator study, was it, sir?
A There were three Barbaro Goodman studies, all with very small numbers of individuals, and those three studies got results that were not internally consistent from a study perspective, but could very well have represented the diversity of how people smoke as well as -- and this is, I think, a concern that we probably agree with.
When you do these kinds of experiments, however, with a vest or some other technique, the mere

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fact that you're doing it in a laboratory with people and asking them to do something that they wouldn't actually do, that itself impacts the value. It doesn't make it valueless, but it is something you have to weigh.

Q Excuse me, Doctor, just a second.

The question was: The other studies were not a smoke simulator study with a smoke simulator device, were they, sir?

A I believe they were.

Q Well, let's see if we can get back to a point of agreement, sir.

If someone compensates fully, they defeat the benefit of low-tar cigarettes. Would you agree with that?

A I would say there is a high likelihood of that.

Q And let's see if we agree, then, further that if a cigarette is easily compensatable, if people can easily compensate with it by switching down and getting as much as they did when they took the higher brand, the higher-yield brand, and if Philip Morris knew that, they absolutely knew that, not only would Philip Morris be negligent because they are not doing what they are expected to do, but they're also

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deceiving people, aren't they, sir, assuming those facts to be true?

A Well, I -- if you're basing this on five out of nine people in a study over a short period of time in a laboratory, and you're calling that knowledge in something that was not replicatable, you know, to take one study out of a large body and you put that up and say, "This is what you knew," reminds me of the fellow who shoots an arrow into a wall and goes over and draws a circle around it and says, "Bull's eye."

If you want to ignore a larger body of data and just focus on one very small study in which a percentage of those individuals demonstrated something by what you yourself would call a distant measure of exposure. If you didn't like cigarette butts, how far can you be from measuring somebody's respiration? They never measured cotinine in these individuals.

So this is just as distant, if not more distant than the cigarette butt argument. If you want to ignore everything else the company did and everything else that other people have done in which our data is totally consistent with the published body of literature, I mean, you can do that.

Q Okay. But let's not ignore that. Let's

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look at what your company knew back in 1961, Exhibit 36. Dr. Wakeham, to the president of the company, Hugh Cullman. He was president at one time. Are you familiar with that?

A I think so.

Q Okay. The jury has seen this document, Exhibit 36.

"As we all know, all too often the smoker who switches to high cigarette winds up smoking more units in order to provide himself with the same delivery which he had before. In short, I don't believe the smoking pattern has changed much even with cancer scares and filter cigarettes."

Now, this kind of a statement was made in '61 before they had the sophisticated ventilation technology, porous paper and all of that stuff. So if people wanted to compensate back then, one of the ways they'd do it, whether they wanted to consciously or not, they would smoke more cigarettes?

A Yeah. I've read this document, and I have concluded that was his opinion at the time, though I am not sure where he got the data from, but it may be correct.

Q And if we look at Exhibit 125, some 10 years later, of your company, we see -- look at the

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cover page. The jury has seen this several times already.

November 1971, confidential tar, nicotine and smoking behavior, Schori and Dunn. You are familiar with this document?

A Yes.

Q Probably shown to you in connection with this case or otherwise?

A Or otherwise.

Q "As tar delivery decreased from that to which the smokers were accustomed, cigarette consumption increased. This resulted in a tendency for the smoker's daily intake of tar to remain constant even though the tar deliveries of the cigarettes he smoked differed markedly."

And then we see over here, "Consumption in terms of cigarette units smoked varied as a function of cigarette tar delivery. Consumption became increasingly larger as tar delivery became increasingly less than that to which the smoker was accustomed."

Are you aware of that?

A As part of -- I mean, this is true, but it is selective. Within the body maybe of this report and subsequent reports, there is additional data that

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says something quite different.
Q And we'll go to this one -- I'm sorry, Doctor, were you done?
A Yes.
Q I am trying to get you out of here.
These findings -- we may go to 12:30 as we discussed.
THE COURT: Proceed, counsel. The jury is okay. I heard a sigh. Proceed quickly, please.
BY MR. WOBBROCK:
Q "These findings do suggest that the smoker does have daily intake quotas for both tar and nicotine. When smoking cigarettes which differ in these parameters from that to which he is accustomed, he has a tendency to modify his smoking behavior in order to maintain his normal intake quotas. He was much more able to maintain a constant tar intake, however, than he was to maintain a constant nicotine intake."
Are you familiar with that statement back in 1971 by your company?
A Yes. Using that methodology that you criticized, yes.
Q Let's jump up to more modern methodology. A statement in an article -- this is Exhibit 2020, and

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it's in evidence by Dr. Benowitz, and one, two, three, four, five additional doctors. The title of the article is, "Smokers of Low-Yield Cigarettes Do Not Consume Less Nicotine."

I am going to ask you if you agree with the following statements and I'm going to direct your attention to, "Discussion," Page 2. And the jury will have this document to analyze for themselves, so I am going to ask you if you agree with this statement.

"Tobacco from low-yield cigarettes do not contain less nicotine than tobacco from higher-yield cigarettes." In other words, the amount of nicotine in the unit of tobacco, whether it be a milligram or a tenth of a gram or whatever, is about the same according to that statement, correct?

A Factoring in that there is less tobacco, yes, I agree.

Q Okay. So all tobacco in cigarettes contains about the same percentage of nicotine according to that statement?

A But different amounts of tobacco.

Q Different amounts of tobacco, and I'll just make up with a number.

A We agree.

Q No. 12, I think.

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"This is probably well known to the tobacco industry, but to our knowledge has not been discussed in the medical literature."

Do you agree with that, sir?

A I have no way of agreeing or disagreeing.

Q Okay.

A I have never thought it something that was not known since it's easily measurable, and I am sort of surprised that Dietrich Hoffmann and his colleagues didn't know that.

Q Okay. But you're not saying that the average person on the street, when they buy a pack of cigarettes, and they go from a Benson & Hedges to a Merit, know that the percentage of nicotine in the tobacco in the cigarette is the same?

A Actually, I have no idea what value that would be since the average individual doesn't know what the transfer coefficient is from nicotine in the tobacco to the cigarette anyway. I understand your point, but I don't see how that could be informative to anybody other than a scientist.

And I'm surprised and I don't doubt Dr. Benowitz's statement that it was unknown to him as he searched to anybody else that he talked to in the medical community, but I get your point.

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Q Well, the point is when someone buys a low-tar, low-nicotine cigarette, they might reasonably assume, might they not, that there's less nicotine in the tobacco in a low-tar, low-nicotine cigarette?

A I wouldn't, but I come from a point of view that says what the FTC number is measuring is what's in the smoke, and all of these things that have been talked about to decrease the amount of tar and nicotine in smoke, the ventilation holes, the porous paper, the special kinds of filters, are meant to reduce what comes out of the tobacco.

And so, is it surprising to me? No. But I am a scientist. I have a different way of looking at it, I guess.

Q Before we get too far afield from the article, I am going to read you a little more of it. What people would reasonably believe and what they do believe when they buy your products would be something that you would expect your company's marketing arm to have studied and learned about, would you not, Doctor?

A Could be. I don't know. I think all they're interested in is complying with the FTC regulation, which is measuring the tar and nicotine that's delivered in the smoke by the standardized tests.

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Q They are interested in at least one other --
A Yes, they are.
Q -- selling as many cigarettes as they can.
A I think selling cigarettes is their function, yes.
Q "The main determinant to whether a cigarette has a low or high yield in machine testing are the characteristics of its ventilation and burning."
Do you agree with that?
A I think that's part of it, not all of it, but part of it.
Q "Both of these variables are under the control of the cigarette smoker and allow considerable variation in nicotine intake."
You'd agree with that?
A Absolutely.
Q "We also found that people who wanted to stop smoking and were smoking low-yield cigarettes did not consume less nicotine as judged by blood cotinine concentration than smokers of high-yield cigarettes."
Do you agree with that finding?
A That's his conclusion from these findings given the test he's used.

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Q In 1983?
A Yes.
Q And then back to the back page, and I'll just ask you this last bit about this article.
"We thing that in the case of the habitual smoker from whom cutting down on nicotine" --
A Excuse me, you don't mean -- you mean the penultimate page.
Q Right above references.
A I have another page.
Q Yeah, that's the footnotes to this page and it connects --
A So it's not the last page.
Q The last page of the text of the article, above references?
A I've got it.
Q "We think that in the case of the habitual smoker for whom cutting down on nicotine and tar intake is considered to be medically important, it is unlikely that changing the brand of cigarette will accomplish this goal."
Do you agree with that?
A Given his data and his analysis, I think it's -- it is not an unreasonable hypothesis.
Q I'm sorry --

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A No, I'm sorry. If, indeed, this data is representative and extrapolatable, it will have an impact.

Q "In summary, we found that the tobacco in low-yield cigarettes does not contain less nicotine than higher-yield cigarettes, and that smokers of these cigarettes do not consume less nicotine. The FTC cigarette testing data do not predict nicotine intake by the cigarette smoker. Advertisements from cigarette manufacturers suggesting that smokers of low-yield cigarettes will be exposed to less tar and nicotine are misleading. Patients who smoke cigarettes should be so advised."

Do you agree with that?

A No, because it is a failure to accurately reflect what the FTC test is about and what the advertising requirements are. This is the evolution, if you will, if evolution is the right word, of what this test was designed to do by the government and for what purpose. So in 1983, Dr. Benowitz is saying this test doesn't reflect this. The test was never designed to reflect it, and it was represented by Philip Morris that the test never would represent it, long before their study came out.

Q If the FTC methods, Dr. Carchman --

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Dr. Carchman, if I can find this here.

If the FTC methods were the truth, why is it necessary to put up Exhibit 2035, unless the FTC methods and how they're related to the people are a half-truth?

A Because your use of the word "truth," is, forgive me, mischaracterizes would be the politest word that I could come up with at this point to describe what you have done.

The truth, if there is such a thing, is specifically defined within the FTC requirements. How people interpret that without reading that, they do so at their own -- at their own peril, in my view. So what Philip Morris has done, to my knowledge, is comply with the law.

Now, people are saying, "Gee, this test doesn't measure something it was never intended nor capable of measuring. Let's do something about it." If that's what needs to happen, then let it happen, but don't go back and rewrite the history, if you will, to get done what needs to be done.

If the methodology needs to be changed, then by golly, let's do the science to change it; but don't go back and rewrite history, revise the facts. And I think that's part of my problem with this. The

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FTC method doesn't measure what people take. Everybody knew that that was involved.

The government knew it, we knew it. We told them we knew it. We had data. Other people had data that suggested this is not what it's about. If you want to represent this as some other creature, that's fine, but I don't think that's appropriate. Let's just get on with it. If we need a better method, let's come up with a better method. Let's not beat each other up over something that just doesn't make any sense to me.

Q When the FTC knows and Philip Morris knows, who, in your mind, has the obligation to tell people like Michelle Schwarz?

A I think it's a shared responsibility, not just with the FTC and the companies, but with the public health community as well, who knew just as much as the FTC and we did. This is a shared societal responsibility. And if the intent -- if the knowledge of this information was to mislead, I can't believe that the public health people or the FTC would put themselves in -- it's inconceivable to me for them to perpetrate such a fraud.

Q You are blaming the FTC now?

A No, you misunderstood what I'm -- I'm

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saying it's inconceivable to me to believe that. I believe they had the best intentions in mind when they did this. The point is the question has changed.

If I wanted a patent attorney to address a question, would I come to you? No. If I wanted to sue somebody I would come to you. You use the right tools for the right -- for the right kinds of applications. If you misapply a tool, you are going to be in a world of hurt.

And what we have here, in my opinion, is a misapplication of what the FTC designed this test to do. If it's the wrong test, then let's get the right test.

Q Doctor, your lawyers have put up a newspaper article that came out in 1983, that appeared one day -- one day in the Salem Statesmen Journal, where Michelle Schwarz lived. And they put it in front of Dr. Benowitz, and they said, "Isn't this about this article, Exhibit 2020?" And he said, "Yes."

A Which article?

Q The article that is in front of you, sir.

And he said, "Yes." And then he said -- the next question to him was, "Wouldn't Michelle Schwarz, if she read that article, know about these

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facts?" And he said, "Well, if she read it, maybe, if she understood it."

And then he said, "But it's not my job to try and inform the people throughout the country about this issue other than to publish it in the medical literature. It's Philip Morris' job, because they have the resources, they have the money, and it's their product to spread the word about full compensation," as he found in this article.

Would you agree with that, sir?

A I agree that it is not necessarily Dr. Benowitz's personal opinion, but to the extent that he is part of the larger public health community in the U.S., and has contributed to numerous Surgeon General's reports, I would think that if the FTC wasn't going to do it, that the Surgeon General -- the Surgeon General should do it or some of the nongovernmental agencies, like the American Cancer Society.

Just like they advertise the potential value of low tar, they could have just as well done this as well without getting in trouble with the FTC.

Q And who is making a hundred million dollars a week and spending five billion dollars a year on advertising related to this product? Who, of

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all the players? It's Philip Morris, isn't it?
A We -- Philip Morris makes a lot of money.
Q They make a lot of money and they've got lots of resources to spread the word, don't they?
A We have money and we have resources. The question is: Is this a legal thing for us to do? I think this exhibit that you put up remains, in my mind, to see whether the government will allow that, whether the government would consider that to be legal. Because, in my view, it potentially undermines the purpose of the federal government's regulations for our industry.
Q And any time in the last 20 years, 30 years, 40 years, when 400,000 people are dying a year prematurely from smoking, and your company is making billions of dollars on cigarettes, you could have gone to the government and you could have said, "Look it, we know about compensation. We know people are getting twice as much as they think they're getting, and we want to tell them."
Did you ever make an effort, your company ever make an effort to get permission to do any of that, or just run the ads and try and do what's right, or have you waited until the Master Settlement Agreement has pushed you in a corner, made you divulge

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records, and tell the American people what your company has been up to for the last 50 years, and now come forth with the truth? Isn't that what's really happened?

A I think this is a recent event. Whether it's related to the MSA or not, I don't know. And with regard to truth -- truth as evident by 30 years of scientific publications in the peer-reviewed literature as reviewed in the Surgeon General's report and consistent with Philip Morris' data, the truth is evident, whether it's in the company's files or in the peer-reviewed literature from other people.

There is no truth that is being concealed. The information that Philip Morris had on this was pretty much the same darn information that everybody else had, whether it's using butt analysis or looking at people breathing, or Dr. Benowitz doing very elegant studies in humans with nicotine. It all boiled down to pretty much the same kind of information.

Q And if I raised my voice at you, sir, I apologize.

A If my voice came up, I apologize as well.

THE COURT: Very good.

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BY MR. WOBBROCK:

Q It's a serious case.

A It's a serious question you're asking me.

Q I am going to read you just a couple more things, and then we'll be done.

Are you familiar with the NCI 13 Monograph, "Risks Associated with Smoking Cigarettes with Low-Measured Yields of Tar and Nicotine"?

A I have read the scientific chapters, but I have to admit I've only had a couple of months. It just came out, as you know, in November of last year; but I have read just the scientific chapters.

Q And it's a review of many years of literature and work by others, is it not, sir?

A No, it's actually more than that. It is, particularly at least in Chapter 4, of which Dr. Burns is the principal author, I believe, the first author, there is the introduction of new data and new analyses, so it's not simply a review. It's more than that.

Q Let me ask you if you agree with this statement.

MR. PHILLIPS: Your Honor, I'm sorry. This document is not in evidence, should not be read to the jury. The Court has excluded it.

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MR. WOBBROCK: Under 706, Your Honor, it's been recognized as an authoritative work by more than one witness, and under 706, it can be used to impeach.

MR. PHILLIPS: He can ask him about the conclusions of it. He should not be able to read it to the jury, Your Honor.

THE COURT: Use it correctly, counsel.

MR. WOBBROCK: Pardon me, Your Honor?

THE COURT: I said, "Use it correctly."

MR. WOBBROCK: Yes. Under 706, I believe, Your Honor, I'm allowed to read it, and that's what I intend to do and ask the witness if he agrees.

MR. PHILLIPS: Your Honor, he may refer to the conclusions and ask whether the witness agrees with the conclusions. He should not be able to read from a document which the Court has excluded.

MR. WOBBROCK: It's used for impeachment, Your Honor, and can be used for impeachment under 706.

THE COURT: Let me take a look.

MR. WOBBROCK: And then I'm done.

MR. PHILLIPS: Your Honor, just for the record, he did this with another witness a couple of weeks ago and the Court told him not to read the

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statement.
MR. WOBBROCK: And that was because that witness was not considered to be an expert.
THE COURT: It may be used for impeach. It may not be used as substantive evidence.
All right. In terms of impeach, you may proceed.
MR. WOBBROCK: Thank you, Your Honor.
BY MR. WOBBROCK:
Q Here's the statement: "Many deceptive practices have been employed over the years. Some continue, too, that foster and perpetuate the illusion that various cigarette brands and product forms are relatively healthy. These tactics include," then skipping a portion, "fooling the machines and using data to fool smokers.
"Filters and cigarette papers were developed starting in the 1950s that 'air conditioned' the smoke by diluting the smoke column with sidestream air. When smoked by machines, as in the FTC tests, low tar and low nicotine numbers resulted. A desirable outcome from promotional purposes, but higher yields were ingested by real smokers, a desirable outcome for maintaining nicotine addiction.
"Low-yield cigarettes were heavily

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promoted. Promotional programs from cigarettes have been lavishly funded in general with advertising and multiple media. A disproportionate amount of this funding promoted low-yield products when they were introduced in the 1970s."

Do you agree with that statement, sir?

A I don't ever remember reading that statement in the scientific chapters of that document.

Q I asked you if you agreed with it, sir?

A No.

Q Let me see if you agree with this: "Little or no meaningful information is contained in promotions for a given cigarette, such as ingredients and additives, the technology of filtration, the hazardous constituents of smoke or the health consequences of smoking.

"Consumer ignorance and confusion has been persistent over many decades. While smokers who switch to low-yield brands manifest faith in the relative healthfulness, few consumers know the true delivery characteristics of the brands that they smoke and even their general impressions are not very accurate."

Do you agree with that, sir?

A I can't imagine I can agree with that. No

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mention of the Congressionally-mandated warning label. I mean, it sounds to me like this doesn't sound like a scientist wrote this.

Q Finally, "Testing byproducts by official government agencies, such as the FTC, imbues the industry with a certain level of credibility while providing government-rated data that can be used for promotional purposes."

Do you agree with that?

A I have no idea what the dickens this person is talking about.

MR. WOBBROCK: I have no further questions, Your Honor.

THE COURT: Counsel.

MR. PHILLIPS: I'll see if I can complete this by 12:30, as I can see our ladies and gentlemen of the jury would like to leave, and I apologize for making them stay.

REDIRECT EXAMINATION

BY MR. PHILLIPS:

Q Let's talk about truth, all right? Let's go to the chart that Mr. Wobbrock wrote for you. You understand that these numbers, Dr. Carchman, are the

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numbers that are required by the FTC?
A In this example, yes.
Q And these numbers are -- Philip Morris is required to put in every one of its advertisements and display prominently. Do you understand that?
A Yes.
Q Okay. And let me just ask you this question because Mr. Wobbrock asked you a question about whether or not they were required to use the word "low" or "lower." Do you recall that question?
A Yes.
Q And you recall that I showed you a decision of the FTC, the governing regulatory agency which specifically authorize the use of such descriptions as long as they were in relation to the FTC's numbers?
A Yes.
Q All right. Let me just imagine a world, imagine a world in which you didn't say Philip Morris -- it dawned on Philip Morris not to say low or lower. Can you stay with me on that?
A Yes.
Q All right. And so all you had was 24, 16 and 8, but you had to show those prominently in the advertisements, okay?

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A Yes.
Q Okay. Now, let me ask you a little question, see if you can stay with me here. What is 16 in relation to 8?
A It's higher.
Q What is 8 in relation to 16?
A It's lower.
Q Are you telling me, Dr. Carchman, that if you don't actually say "higher" or "lower," the numbers actually tell you whether they're higher or lower?
A If you understand numbers, yes.
Q Thank you. Now, let me ask you another question. Mr. Wobbrock said you knew about compensation, and you knew that these numbers didn't mean anything. He asked you questions about that; is that right?
A Yes.
Q Now, what he showed you in terms of a document that reflects what Philip Morris has been doing for the last year and half in its advertising describing that how you smoke may affect how much tar and nicotine you get, that's the same thing that Philip Morris told the FTC when they adopted this procedure, correct?

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A Yes.
Q Okay. Now, that doesn't mean that these numbers are meaningless, does it?
A No.
Q In fact, the reason that these numbers were established by the FTC was so one consumer, like Michelle Schwarz, could compare this brand from this brand or this category from this category, correct?
A Yes.
MR. WOBBROCK: Excuse me, now counsel is testifying, Your Honor. He is leading the witness.
MR. PHILLIPS: I'll try not to lead, Your Honor, thank you.
THE COURT: Proceed, please.
BY MR. PHILLIPS:
Q So is my understanding correct, sir, that the purpose that the FTC established these numbers was to compare?
A That was the reason, was to allow the consumer to compare the different brands that were commercially available.
Q Is that the case in that the consumer doesn't necessarily get 16 or 8, but they can compare between those two brands?
A Yes. That was my reading of that

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regulation.
Q And with respect to a potentially new test, would that also be the purpose, to compare?
A It could very well be part of that, yes.
Q Do you understand that Massachusetts has derived its own test to look at this question?
A Yes.
Q And it used more intensive parameters for smoking?
A Yes.
Q And with respect to that, is that for the purpose of comparing?
A Yes.
Q All right. And do you understand that Massachusetts, this number goes to 48, this one goes to 32, and this one goes to 16?
A Yes. There is a relative shift, but the comparison is the same.
Q Let me again just ask you the question. Which is higher, 16 or 32?
A 32.
Q Which is lower, 32 or 48?
A 32.
Q All right. So under both circumstances both tests provide a comparison?

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A That's correct.
Q Now, I needed to ask you this question, Dr. Carchman. This is very important. Do you believe that those numbers, the numbers that the FTC requires, do not provide useful information to consumers?
A In terms of comparison, they do.
Q Is the reason for that because you believe, based upon your scientific opinion, that compensation is not complete?
A Yes, that's what I've said.
Q And Mr. Wobbrock showed you an article by Dr. Benowitz in 1983. Have there been hundreds of articles since 1983 demonstrating that compensation is not complete?
A Yes.
Q Have there been articles by Dr. Benowitz since 1983 saying compensation is not complete?
MR. WOBBROCK: Objection, hearsay.
THE WITNESS: Yes.
BY MR. PHILLIPS:
Q Let me ask you this, sir. Has Philip Morris done studies very recently using measures that are more precise than cotinine to determine whether compensation is complete?
A Yes.

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Q You mentioned that cotinine is a measurement of the blood, but it's a very approximate measure of nicotine?
A Yes.
Q What are you using in your studies today to try to measure whether compensation is complete?
A Instead of using simply cotinine, which measures at best 10 to 30 percent, we've developed a methodology that gives us 80 to 90 percent, looking at five to six nicotine metabolites, of which cotinine is not even the largest one. Trans three hydrazine cotinine is the major nicotine metabolite in people.
Q And do you think that the study you've performed is a more precise measure of how much nicotine a smoker is actually taking into their body?
A In that experiment, yes.
Q And did that study show complete compensation?
A No.
Q Is that study consistent with the history of scientific literature that you have been aware of within Philip Morris and outside of Philip Morris over the last 40 years?
A Yes.
Q All right. Now, let me ask you another

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question. We talked about INBIFO. You were shown some documents from a couple of people from 25 years ago. Do you recall that?

A Yes.

Q You are not going to sit here and defend an employee of Philip Morris who may have actually destroyed a copy of a document, are you?

A Absolutely not.

Q You're not going to defend an employee of Philip Morris who tried to hide the trail of how documents travel between Europe and Philip Morris, are you?

A No.

Q Are you here to tell the jury that that's completely inconsistent with your many years of experience with Philip Morris?

A Not only is it inconsistent, the real reason I came to Philip Morris was because of what I saw and my interactions with the scientists at the institute. And if there was anything that I saw that would have shaken my confidence, it would have been a belief that there was some hanky panky going on in terms of studies and/or documents being hidden or destroyed.

Q And are you satisfied, sir, from your

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review, recognizing the importance of this with respect to allegations that have been established, that all of the studies of INBIFO are available, publicly available, for review?

A They are now, yes.

Q Have you reviewed to see whether any of them have been destroyed?

A I have gone back several times over the years, not as a matter of science, but as a matter of conscience, if you will, and I have found evidence that they kept such incredible files of what they had. If there would have been any impropriety, that it would have been easy to discover, and there is nothing.

They kept the darn stamp receipts for the stuff they mailed out. They knew who had what copy. They knew when that copy came back. They knew when that copy was destroyed. The institute kept all of the original documents. They still have the experimental biological material. They still have that.

Q I don't mean to interrupt you, but I am interested in the time, sir.

One thing is for sure. Mr. Wobbrock didn't show you a single study from INBIFO that

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matters to this case, did he?
A No.
Q He didn't show a single study from INBIFO, all of which are available, which would have affected or accelerated any of Philip Morris' efforts to make a less-hazardous cigarette, did he?
A No.
Q He didn't show you anything that would have indicated that Philip Morris could have made a less hazardous cigarette faster in this marketplace, did he?
A He did not.
Q And when he showed you a document written by someone which says, "Within our laboratories, no work is being conducted on biological systems," is that consistent with your experience at Philip Morris?
A Nor with the history of the documents, no.
Q Now, he was also asking you questions about commercial products, and the fact that over the last few years, you have begun testing commercial products with certain biological testing, correct?
A Yes.
Q Now, you testified yesterday about reference cigarettes. Do you recall that?
A Yes.

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Q And are you satisfied based on your professional opinion, your expertise on risk reduction, Dr. Carchman, are you satisfied that Philip Morris' work with respect to reference cigarettes to determine the potential risks associated with adding ammonia or burley tobacco or any other ingredient in cigarettes was satisfactory and adequate to ensure that risks were not being increased by adding those components?

A Yes, I was.

Q Same was true with nitrosamines. Nitrosamines, those having been studied through reference cigarettes, have they not, for 40 years by Philip Morris?

A Yes.

Q You were asked questions about the external research program at Philip Morris. I need to ask you a couple of questions and I'll be very brief. External research at Philip Morris, that's something that Philip Morris is funding of external scientists, places like Stanford and Harvard and so forth?

A Yes.

Q And that's been happening over the last couple of years?

A Yes.

http://legacy.library.ucsf.edu/tid/pwv95a00/pdf Source: www.tobaccoindustrydocuments.ucsf.edu/docs/xyxd0001

Q You were asked a question about what the budget was, and you explained that's $20 million; is that right?
A Yes.
Q And does Philip Morris have a scientific advisory board of independent scientists from the government and the universities that are dictating what should be funded for that?
A Yes.
Q And is there any limit on the budget for that external funding?
A There has not been.
Q You understand -- let me ask you this: Is the external research program at Philip Morris a replacement for the fact that the Master Settlement put out of existence the Council for Tobacco Research?
A I think it was a contributor.
Q And do you understand that the Council for Tobacco Research also funded independent research for 35 years before that?
A Yes.
Q At places like Stanford and Harvard and a variety of other places?
A Yes.
Q And do you understand that the CTR

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research was cited 600 times in Surgeon Generals' reports?

MR. WOBBROCK: Your Honor, we're way beyond the scope of my direct now.

MR. PHILLIPS: I'll move off of that, Your Honor.

THE COURT: Please.

BY MR. PHILLIPS:

Q All right. Do you ever, ever in your working existence, did you have a lawyer attempt to control anything about the research you were doing in trying to make a less-hazardous cigarette?

A Absolutely not.

Q Going to lawyers, sir, you mentioned your wife is a lawyer?

A Yes.

Q She is also a medical doctor, is she not?

A Yes.

Q She is also a Ph.D, is she not?

A Yes.

Q Is that one place at least, Dr. Carchman, where you don't feel like you are the smartest person in the room?

A Yes.

Q You don't have to answer that question.

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You would like to go back and say hello to her this evening?

A Yes, I'd like to.

Q All right. Please do.

A Thank you.

THE COURT: Doctor, you are excused and thank you very much. Have a good trip back home.

All right. Counsel, can you help me a little bit, from the defense. How much more witnesses do you have?

MR. PHILLIPS: In front of the jury?

THE COURT: I am just trying to help out. I'm trying to give them an idea of whether we are finally coming to a conclusion.

MR. DUMAS: Barring any unforeseen scheduling problems, the defense plans on resting on Tuesday, Your Honor. And we will be ready to proceed to closing argument.

MR. TAUMAN: Don't we get a rebuttal case?

THE COURT: You get rebuttal.

MR. TAUMAN: Can we ask what time on Tuesday?

MR. PHILLIPS: Let's confer.

MR. DUMAS: I can't be that precise, Your Honor.

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THE COURT: We will probably get done some time next week. Leave your notes in the jury room, don't discuss the case over the weekend. Have a good weekend. Be back in the jury room approximately at 8:55 p.m., Monday morning -- a.m. not p.m.

(Short recess taken.)

(The following proceedings were held in open court, out of the presence of the jury:)

MR. WOBBROCK: I think we can probably fill at least a half day with some legal matters, and I think it's going to work out just fine, but I can't promise you we won't have a little downtime for availability of a rebuttal witness, and I wanted to alert the Court to that. It would be first thing Thursday morning.

If we got the legal matters out of the way the day before, on Wednesday, then we could go right into argument after that witness, which will be short.

MR. DUMAS: Are we on the record?

MR. WOBBROCK: Oh, I didn't mean to be on the record, but that's okay.

MR. PHILLIPS: Could you just repeat it, please? I didn't hear what you said.

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MR. DUMAS: He's already forgotten, Your Honor.

MR. WOBBROCK: I have to check with my captain.

It looks like we're going to have a rebuttal witness on Thursday. We also may have someone on Wednesday, but we may not be able to finish the day on Wednesday with witnesses, Your Honor.

But we do have legal matters to cover, and if we then put on the rebuttal witness first thing, which will be short, then I can go into my closing argument, assuming I am still able to walk and talk, and proceed that way without any downtime between that last witness to go over instructions and stuff, having accomplished that the day before, because that last witness shouldn't have any bearing on those issues, and it should be a fairly short witness.

THE COURT: All right, very well.

Somebody wanted to put something on the record?

Mr. Dumas, did you have something?

MR. DUMAS: Yes, thank you, Your Honor. Just a couple of simple matters, I guess.

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First, with regard to rebuttal, I don't know if this is still on the radar screen or not, but with regard to the potential rebuttal witness, who is apparently maybe appearing by way of video conferencing, the Court may recall that issue came up. I don't know if that is still going to happen or not. If it is not going to happen, then my issue is moot.

MR. TAUMAN: Well, this is our situation, and that's why I was hoping to get a time on Tuesday so we can start planning our rebuttal case. Our rebuttal case in bulk, from beginning to end, is very short, probably less than half a day.

The problem is we don't know when we are going to start, and we have some witness problems of someone who will be available Tuesday afternoon, maybe even late Tuesday afternoon, but Wednesday they're not available, but they're available by video on Wednesday because they happen to be attending a conference. That's what we don't know.

Now, we do have one witness that we know that I told you about that will be testifying to authenticate those photographs by telephone. We don't need the fancy video hookup there, and that will be about a five minute --

http://legacy.library.ucsf.edu/tid/pwv05a00/pdf Stanford Libraries industrydocuments.ucsf.edu/docs/xyxd0001

MR. PHILLIPS: Here's what I suggest, Your Honor. We have to sort ourselves -- we'll get in touch with these guys over the weekend, and we'll try to get a better fix on whether we can finish early on Tuesday or whatever. That may give you the information you need for purposes of whether you can put your whole rebuttal case on Tuesday.

MR. WOBBROCK: There is one issue, though, Judge, and if there is going to be any glitches, and I'd leave this to Mr. Tauman, there is the option of perpetuating someone this weekend perhaps. I don't know.

MR. PHILLIPS: We'll get ahold of you and let you know. You can you tell us if you have a problem, and if you need to perpetuate, we'll talk about that.

THE COURT: All right.

MR. DUMAS: We have a fair number of exhibit issues, I think both parties do. I guess we'll do that first thing Monday morning.

THE COURT: Okay.

MR. DUMAS: Okay. Thanks, Judge.

THE COURT: All right. Everybody have a good weekend.

MR. WOBBROCK: Thank you, Your Honor.

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(Short recess taken.)
MR. WOBBROCK: On the record.
I am going to mark the compensation document with 24 milligrams and 16 milligrams and 8 milligrams as 2036.
MR. DUMAS: Demonstrative?
MR. WOBBROCK: Demonstrative, yes.
(Court adjourned, Volume 41-B, at 12:45 p.m.)

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REPORTER'S CERTIFICATE

I, Katie Bradford, Official Reporter of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I reported in stenotype the oral proceedings had upon the hearing of the above-entitled cause before the HONORABLE ROOSEVELT ROBINSON, Circuit Judge, on March 8, 2002;

That I have subsequently caused my stenotype notes, so taken, to be reduced to computer-aided transcription under my direction; and that the foregoing transcript, Volume 41-B, Pages 1 through 65, both inclusive, constitutes a full, true and accurate record of said proceedings, so reported by me in stenotype as aforesaid.

A transcript without an original signature and red CSR seal is not certified.

Witness my hand and CSR Seal at Portland, Oregon, this 23rd day of August, 2002.

_____

Katie Bradford, CSR 90-0148
Official Court Reporter

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